Supreme Court, U. S.
FILED
JAN 14 1980
MICHAEL RODAK, JR., CLERK

No. 79-741

In the Supreme Court of the United States

OCTOBER TERM, 1979

SAFEWAY TRAILS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

DAVID S. FISHBACK
Attorney
National Labor Relations Board
Washington, D.C. 20570

INDEX

CITATIONS

Cases:

Statute: Page

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-741

SAFEWAY TRAILS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A87-A94) is not yet reported. The supplemental decision and order of the National Labor Relations Board (Pet. App. A58-A86) are reported at 233 N.L.R.B. 1075. The Board's initial decision (Pet. App. A1-A51) is reported at 216 N.L.R.B. 951; that of the court of appeals (Pet. App. A52-A57) is reported at 546 F.2d 1038.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1977. The petition for a writ of certiorari was filed on November 8, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that petitioner failed to bargain in good faith with the union by seeking to undermine the authority of the union's bargaining agent.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 3-4. Also relevant is Section 8(a)(1), 29 U.S.C. 158(a)(1):

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

STATEMENT

1. On March 31, 1972, the collective bargaining agreement between petitioner (herein "the Company") and the Union[1] expired. The parties had been negotiating for a new agreement, but none was

[1] United Transportation Union, Local 1699.

reached and the employees went on strike on April 2, 1972. Bargaining sessions continued; the Company was represented by its president, Marvin Walsh, and the Union by its chairman John Lantz. (Pet. App. A61; Tr. 31-33, 237, 533-534, 544, 581-582.)[2]

Shortly after the strike began, Walsh wrote a letter to all employees stating that most of the negotiating meetings had been "meaningless, or at least fruitless, because [Lantz] was not prepared, did not have his full committee, and met either by himself or with one member most of the time [and] insisted upon ridiculous demands * * * which made it impossible to reach an agreement." (Pet. App. A62; A. 33a-34a.) About a month later, on May 4, 1972, Walsh wrote to a federal mediator (with copies to the employees and the Union's international president and vice president) stating that Lantz lacked "responsibility and sincerity [and that it was] high time the UTU grand lodge assume[d] its responsibility for the people they represent * * *" (Pet. App. A62; A. 35a). The following week, Walsh again wrote to the employees, accusing Lantz of misrepresenting facts to them (Pet. App. A62; A. 65a). And in June 1972, Walsh telephoned a former president of the Union complaining of Lantz's conduct of the negotiations (Pet. App. A62; Tr. 103-104).

Meanwhile, an internal company memorandum evaluating the April 28, 1972, negotiating meeting

[2] "Tr." refers to the transcript of the hearing before the administrative law judge. "A." refers to the printed appendix in the court of appeals.

stated that there was "no possibility of settling a contract with Lantz" and outlined "three possibilities":

> (1) Inform the membership and the employees of the absolute irresponsibility of their representation in an effort to get them to boot Lantz out.
>
> (2) The UTU International taking over these negotiations and putting in someone who can intelligently negotiate and reach an agreement.
>
> (3) Failing to achieve Nos. 1 and 2, appears that this will be a long work stoppage with the definite possibilities of having to put this company back to work without a settlement with the UTU.

(Pet. App. A63; A. 48a-49a).

In August 1972, following a Union decision not to submit a contract proposal by the Company to the membership, Walsh sent a letter to the employees criticizing Lantz for that decision, and charging that no contract agreement had been reached "principally because [Lantz] has consistently made more and more demands that we cannot possibly accede to, and * * * won't approve for the record those issues which we have agreed upon"; Walsh urged the employees that "time for action on your part is past due." The letter went on to argue that the Company's proposal should be accepted, and expressed the "hope that each of you will act in the interest of your own personal welfare and aid in getting an early settlement of this strike" (Pet. App. A64-A66; A. 38a-40a).

In October 1972, Walsh telephoned an employee and told him that he was having a "rough time" bargaining with Lantz and further asserted something to the effect that "I can't negotiate with Lantz" (Pet. App. A66; Tr. 75-76).

In December 1972, Walsh wrote to 26 senior striking employees, defending the Company's most recent contract offer, stating that "[i]t is very puzzling to me why the operators, who have been with this company so many years, would allow a chairman [Lantz] with a 1967 seniority date to take over and control the operators as he has done" (Pet. App. A66-A67; A. 25a).

In February 1973, Walsh told the wife of a striking employee that if he could "meet with any three men on the roster other than John, John Lantz, * * * I will guarantee that I can have this contract settled within 2 to 3 hours" (Pet. App. A67-A68; Tr. 44-45).

In March 1973, Walsh told another employee that he "couldn't understand why the men were letting John Lantz keep them in the streets and that he couldn't understand why they couldn't do something to get this thing settled, that the older men [could] get together and do something to get this thing settled" (Pet. App. A68; Tr. 182). That same month, the Company's vice president told strikers that they were "following the wrong man" (Pet. App. A68; Tr. 80).

The strike ended in March 1975 (Pet. App. A61). A decertification election was held among the Com-

pany's employees in 1976, and the Union lost its representative status. *Safeway Trails, Inc.*, 224 N.L.R.B. 1342 (1976).

2. In its supplemental decision, the Board concluded, contrary to its prior decision,[3] that the Company's course of conduct away from the bargaining table constituted a campaign intended to undermine support for the Union bargaining agent Lantz among the employees (Pet. App. A69). After examining the Company's entire course of action away from the bargaining table, the Board determined that the Company's "efforts here were not within the purview of permissible communications, but were directed to having the Union's representative replaced with someone more amenable to accepting the Company's proposals" (Pet. App. A69). The Board found that the Company had attempted to "driv[e] a wedge between the

[3] In its original decision the Board, affirming the administrative law judge, dismissed the complaint (Pet. App. A2). The law judge held that the General Counsel had conceded that the Company's at-the-table bargaining was conducted in good faith (Pet. App. A8), and that therefore there was " 'no basis for concluding on the strength alone of the [Company's] statements away from the bargaining table that its otherwise lawful bargaining conduct was converted into a violation of section 8(a)(5).' " (Pet. App. A50.)

The court of appeals vacated the Board's dismissal order, finding that the General Counsel had not made any such concession (Pet. App. A54), but had merely eschewed reliance on the Company's at-the-table conduct to prove a violation of Section 8(a)(5) (Pet. App. A54-A55). The court remanded the case to the Board for a determination whether the behavior described above was sufficient, in the absence of at-the-table evidence, to establish a violation of petitioner's duty to bargain in good faith (Pet. App. A56-A57).

Union's chosen negotiator, John Lantz, and the Union membership [by] continuing a campaign with numerous not-so-subtle suggestions that the presence of John Lantz as union negotiator was the primary reason that labor peace had not been reached" (Pet. App. A69). The Board concluded that the Company's conduct constituted bad faith and a violation of Section 8(a)(5) and (1) (Pet. App. A70-A72).[4]

3. The court of appeals, per curiam, affirmed the Board's decision and enforced its order (Pet. App. A87-A94).

Relying on *General Electric Co.*, 150 N.L.R.B. 192, 194-195 (1964), enforced, 418 F.2d 736, 756-757 (2d Cir. 1969), cert. denied, 397 U.S. 965 (1970), the court noted that it is a violation of the Act for an employer to seek to discredit the bargaining representative in the eyes of the employees (Pet. App. A90-A91). The court concluded that petitioner "engaged in this prohibited conduct" (Pet. App. A91).

The court also rejected petitioner's argument that Section 8(c) of the Act precluded the unfair labor practice finding, explaining that the purpose of the "free speech" provision of the Act

[4] The Board further determined that these unfair labor practices "aggravated and prolonged the strike, thereby converting the economic strike herein into an unfair labor practice strike" (Pet. App. A71), thus entitling the strikers to reinstatement and backpay from the date of their March 1975 offers to return to work (Pet. App. A73, A86). Furthermore, the Board concluded that the decertification election should not have been held due to the unfair labor practices, set aside the result of that election, and issued a bargaining order (Pet. App. A74).

"was hardly to eliminate all communications from the Board's purview, for to do so would be to emasculate a statute whose structure depends heavily on evaluation of motive and intent." The section resulted from the Board's practice of inferring the existence of an unfair labor practice from a totally unrelated speech or opinion delivered by an employer. Its purpose "was to impose a rule of relevancy on the Board in evaluating the legality of statements by parties to a labor dispute."

In the case before us, the employer's communications are more than evidence of an unfair labor practice; they are the unfair labor practice itself. [Pet. App. A93; footnotes omitted.]

ARGUMENT

The decision of the court of appeals is correct. There is no conflict among the circuits or with this Court, and further review is unwarranted.

1. Petitioner urges that its conduct "represented nothing more than an expression of [its] view of the negotiations and its view of the reasons for the stalemate" (Pet. 14); and, as such, is within the ambit of *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 490 (1960) (Pet. 10-13), and is protected by Section 8(c) of the Act (Pet. 13-15). However, the Board, upheld by the court of appeals, found that the Company was not merely expressing its views to the employees—which, as the Company correctly

states, it would have been entitled to do[5]—but was engaged in a campaign to discredit the Union's negotiator in the eyes of the employees in order to cause them to replace him with someone more amenable to the Company's proposals.

There is no merit to the Company's contention (Pet. 10-13) that *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477 (1960), holds that away-from-the-table conduct, standing alone, cannot constitute bad faith bargaining. There the Court held that a union's lawful, though unprotected, economic activity to support its bargaining demands could not be the basis for a finding of bad faith bargaining "unless there is some specific warrant for its condemnation

---

[5] See, *e.g.*, *Proctor & Gamble Mfg. Co.*, 160 N.L.R.B. 334, 340 (1966) (Pet. 9, 14), where the Board found that the employer's criticism of the union's bargaining conduct was not violative of the Act. The Board explained that the employer's communications were not "motivated" or "designed to subvert employee choice of a bargaining representative, and hence were permissible here." Conduct which is so motivated, however, is violative of the Act. See *General Electric Co., supra; Kellwood Co.* v. *NLRB*, 434 F.2d 1069, 1073-1074 (8th Cir. 1970), cert. denied, 401 U.S. 1009 (1971); *General Athletic Products Co.*, 227 N.L.R.B. 1565, 1575 (1977). *Wantagh Auto Sales, Inc.*, 177 N.L.R.B. 150, 154 (1969), and *Stokely-Van Camp, Inc.*, 186 N.L.R.B. 440, 450 (1970) (Pet. 14), are inapposite. In those cases the Board rejected, as a factual matter, allegations that employers had interfered with their employees' choice of representative. Similarly, in *NLRB* v. *Movie Star, Inc.*, 361 F.2d 346, 349 (5th Cir. 1966) (Pet. 9), the court approved an employer's direct plea to employees to accept its final contract offer, rejecting the contention that the plea amounted to an attempt to bargain directly with the employees.

of the precise tactics involved * * *" (*id.* at 490). Here, contrary to *Insurance Agents'*, there was "specific warrant for condemnation" of the Company's tactics, for, contrary to the Company's assertion, its statements were not mere expressions of its views, but an attempt to drive a wedge between the Union bargaining committee and the employees. Such conduct interferes with the fundamental right of employee self-organization and consequently is conduct which the Act condemns. *NLRB* v. *General Electric Co., supra,* 418 F.2d at 756-757; cf. *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 617 (1969). As the court of appeals stated (Pet. App. A93): "It defies logic and good sense to suggest that such statements are beyond the purview of the Board." Accord, *Kellwood Co.* v. *NLRB, supra,* page 9 note 5.

The Company's argument (Pet. 13-15) that Section 8(c)[6] precludes the Board's finding here fails for the same reason. Thus, the Company relies on *NLRB* v. *General Electric Co., supra,* 418 F.2d at 755-756 (Pet. 15), for the proposition that "[i]n circumstances such as these, the interests of free speech and informed choice must prevail over the slight possibility that the representatives' positions might be undermined." The circumstances to which the court in

[6] Section 8(c) provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expressions contains no threat of reprisal or force or promise of benefit.

General Electric referred, however, are those where the statements at issue do not have "anything more than an informational purpose," not those where the company attempts "to reach a separate settlement with the local," in derogation of the representative status of the international union. Here, as both the Board (Pet. App. A70) and the court of appeals (Pet. App. A91) found, petitioner's course of conduct, which was designed to undermine the Union representative's position, fell on the forbidden side of the fence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM A. LUBBERS
General Counsel

WADE H. MCCREE, JR.
Solicitor General

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

DAVID S. FISHBACK
Attorney
National Labor Relations Board

JANUARY 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 308086 181